

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of

Service Rules for the 698-746, 747-762, and 777-792 MHz Bands

WT Docket No. 06-150

Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems

CC Docket No. 94-102

Section 68.4(a) of the Commission's Rules Governing Hearing Aid-Compatible Telephones

WT Docket No. 01-309

Biennial Regulatory Review – Amendment of Parts 1, 22, 24, 27, and 90 to Streamline and Harmonize Various Rules Affecting Wireless Radio Services

WT Docket No. 03-264

Former Nextel Communications, Inc. Upper 700 MHz
Guard Band Licenses and Revisions to Part 37 of the
Commission's Rules

WT Docket No. 06-169

Implementing a Nationwide, Broadband, Interoperable Public Safety Network in the 700 MHz Band

PS Docket No. 06-229

Development of Operational, Technical, and Spectrum Requirements for Meeting Federal, State, and Local Public Safety Requirements Through the Year 2010

WT Docket No. 96-86

Declaratory Ruling on Reporting Requirement under Commission's Part 1 Anti-Collusion Rule

WT Docket No. 07-166

OPPOSITION OF CELLCO PARTNERSHIP D/B/A VERIZON WIRELESS

The Petition for Further Reconsideration¹ filed by Council Tree Investors, Inc. and Bethel Native Corporation (collectively, “Council Tree”) is just their latest attempt in a seemingly never-ending quest to unwind the results of multi-billion dollar spectrum auctions. Specifically,

¹ See Petition for Further Reconsideration, WT Docket No. 06-150, CC Docket No. 94-102, WT Docket No. 01-309, WT Docket No. 03-264, WT Docket No. 06-169, PS Docket No. 06-229, WT Docket No. 96-86, WT Docket No. 07-166 (filed May 1, 2013) (“Petition”).

Council Tree seeks here to undo the results of Auction 73, which took place in 2008. Council Tree's theory is and has always been that the competitive bidding rules used by the Commission to determine eligibility for preferred designated entity ("DE") status are unlawful and thus that any FCC spectrum auction in which DE eligibility was determined using those eligibility rules must be vacated.² Despite making various procedural and jurisdictional missteps throughout this quest, Council Tree succeeded in having a federal appellate court address the merits of this issue. Unfortunately for Council Tree, it lost. The Third Circuit ruled that the results of Auction 73 should not be unwound on the basis of the procedurally defective bidder-eligibility rules.³ Undeterred, Council Tree continues to advance the very same theory before the Tenth Circuit,⁴ and now here before the Commission, in the hopes of ultimately obtaining from some federal appellate court the very same remedy already denied it by the Third Circuit. For these and the reasons detailed below, Council Tree's Petition for Reconsideration should be dismissed and/or denied.

I. ARGUMENT

Council Tree seeks "further reconsideration" of the Memorandum Opinion and Order on Reconsideration, released March 1, 2013 in the above-captioned proceedings ("*Reconsideration Order*"),⁵ an order that (among other things) dismissed a petition for reconsideration filed in

² Designated entities or DEs are several statutorily prescribed groups eligible for bidding credits in FCC auctions, which discount the payments DEs are required to make for licenses they win at auction "in an amount measured as a percentage" of their winning bids. *Council Tree*, 619 F.3d at 239 (citing 47 C.F.R. § 1.2110(f)(2)(i) – (iii)).

³ See *Council Tree Commc'ns, Inc. v. FCC*, 619 F.3d 235, 258 (3d Cir. 2010), *cert. denied*, 131 S. Ct. 1784 (2011).

⁴ See *Council Tree Investors v. FCC*, No. 12-9543 (10th Cir. filed March 29, 2012).

⁵ *Service Rules For The 698-746, 747-762, And 777-792 MHz Bands*, Memorandum Opinion and Order on Reconsideration, FCC 13-29, 28 F.C.C.R. 2671 (rel. March 1 2012).

2007 by Frontline Wireless, LLC (the “Frontline Petition”) that had sought to modify one of the Commission’s since-invalidated DE rules (the so-called “impermissible material relationship rule”) as to two spectrum blocks (the C and D Blocks) that were scheduled to be auctioned in Auction 73. In the *Reconsideration Order*, the Commission dismissed the Frontline petition as moot to the extent it sought to modify the “impermissible material relationship rule” with respect to the C Block because that rule was invalidated as to the C Block by the Third Circuit.⁶ The Commission likewise dismissed the Frontline Petition as moot as to the D Block because the Commission had waived the “impermissible material relationship rule” as to the D Block several years earlier,⁷ and the D Block was subsequently re-allocated for use by public safety entities pursuant to Congressional directive.⁸

Council Tree’s Petition to reconsider the *Reconsideration Order* should be denied for several reasons.

First, the Petition is procedurally improper under Rule 1.429(i). Rule 1.429(i) provides that “[a]ny order addressing a petition for reconsideration which modifies rules adopted by the original order is, to the extent of such modification, subject to reconsideration in the same manner as the original order.”⁹ But if the earlier reconsideration order made no modification to the underlying order, it is not subject to further reconsideration. In such a scenario, a successive

⁶ *Council Tree*, 619 F.3d at 254-55.

⁷ *Waiver of Section 1.2110(b)(3)(iv)(A) of the Commission’s Rules for the Upper 700 MHz Band D Block*, 22 F.C.C.R. 20354 (2007).

⁸ *See Reconsideration Order* ¶¶ 27-32 & accompanying footnotes.

⁹ 47 C.F.R. § 1.429(i).

petition for reconsideration may be dismissed as “repetitious.”¹⁰ That is the precise scenario here, as the *Reconsideration Order* dismissed the Frontline Petition, without making any modification to the underlying order. Council Tree’s Petition, which seeks “further” reconsideration of the dismissal of the Frontline Petition, thus should be “dismissed by the staff as repetitious.”¹¹

Second, the Petition is procedurally barred because the Third Circuit’s decision in *Council Tree* is not a “new event[]” or “changed circumstance[]” that justifies the filing of a petition for reconsideration.¹² Council Tree is correct that “reconsideration petitions reliant on ‘facts or arguments which have not previously been presented to the Commission will be granted only’ in one of three enumerated circumstances.”¹³ However, the one enumerated circumstance that Council Tree claims applicable—that “[t]he facts or arguments relied on relate to events which have occurred or circumstances which have changed since the last opportunity to present such matters to the Commission”¹⁴—does not actually exist here. Council Tree contends that it had no opportunity to bring to the FCC’s attention the Third Circuit’s vacatur of two DE rules on procedural grounds. But the Third Circuit issued its ruling more than two-and-a-half years before the FCC issued the *Reconsideration Order*, and there is no reason why Council Tree could not have addressed the Third Circuit’s decision in *Council Tree* during the pendency of the Frontline Petition.

¹⁰ *Id.* (“Any order addressing a petition for reconsideration which modifies rules adopted by the original order is, to the extent of such modification, subject to reconsideration in the same manner as the original order. *Except in such circumstance, a second petition for reconsideration may be dismissed by the staff as repetitious.*”) (emphasis added).

¹¹ *Id.*

¹² Petition at 8.

¹³ Petition at 8 (quoting 47 C.F.R. § 1.429(b)).

¹⁴ 47 C.F.R. § 1.429(b)(1).

Third, even setting aside these procedural defects, the relief Council Tree seeks here could not be provided in this context. Council Tree’s Petition seeks reconsideration of a Commission order dismissing the Frontline Petition as moot. At issue then is whether or not the Frontline Petition was moot, not the question that Council Tree actually wants addressed here—whether to rescind the results of Auction 73. Thus, the Petition is not a proper vehicle for consideration of that ultimate question.

Fourth, the Third Circuit in *Council Tree* rejected the very same argument that Council Tree advances here, holding that it would be “imprudent and unfair” to unwind Auction 73.¹⁵ Having already litigated that issue and lost, Council Tree is precluded from relitigating the issue.¹⁶

Fifth, rescinding the results of Auction 73 would be improper in any event. No court has ever found that the Commission’s conduct of Auction 73 was unlawful. Moreover, nullifying the results of Auction 73 would be extremely disruptive. As the Third Circuit concluded, such a remedy would involve not only rescinding over \$19 billion in transactions between the federal government and “innocent third part[y]” auction winners but also “upsetting what are likely billions of dollars of additional investments made in reliance on the results, and seriously disrupt[] existing or planned wireless service for untold numbers of customers.”¹⁷ That reasoning applies with even more force here, nearly three years later, as blameless auction winners have poured billions of dollars of additional investments into further developing the

¹⁵ *Council Tree*, 619 F.3d at 258.

¹⁶ *See Taylor v. Sturgell*, 553 U.S. 880, 892 (2008).

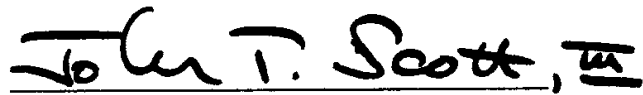
¹⁷ *Council Tree*, 619 F.3d at 258.

Auction 73 spectrum, and millions of wireless subscribers across the country have come to rely on this spectrum every day for advanced wireless services.

II. CONCLUSION

In view of the foregoing, the Commission should dismiss and/or deny Council Tree's Petition.

Respectfully submitted,

A handwritten signature in black ink that reads "John T. Scott, III". The signature is written in a cursive style with a horizontal line underneath the name.

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July 2, 2013

CERTIFICATE OF SERVICE

I, Sarah Trosch, do hereby certify that on this 2nd day of July 2013, I caused copies of the foregoing "Opposition of Celco Partnership d/b/a Verizon Wireless" to be delivered to the following via First Class U.S. mail:

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/s/

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